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317919—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1005

ORVILLE J. TAYLOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the Board of Tax Appeals (R. 90–91) is unreported. The opinion of the Circuit Court of Appeals (R. 113–117) is reported in 117 F. (2d) 189.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1941 (R. 118). The petition for a writ of certiorari was filed on April 30, 1941. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Board of Tax Appeals held that a loss occurred in a different year than claimed by the taxpayer in this proceeding. The questions are—

1. Whether the evidence supporting the Board's decision is less definite than would have been required of the taxpayer if he had claimed the loss for the year in which the Board held it occurred.

2. If not, whether petitioner has been deprived of his property without due process of law.

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or
>
> * * * * *
>
> [U. S. Code, Title 26, Sec. 23.]

STATEMENT

The petitioner is a practicing attorney, and was a director, vice president, and general counsel of the Studebaker Mail Order Company, a holding company which owned practically all of the stock of the South Bend Watch Company, the Studebaker Watch Company, and two other companies. He was given 1,000 shares of the common stock of the Mail Order Company in 1924, and thereafter bought 2,300 additional shares, paying a total of $36,462.50 for them (R. 82).

Beginning with the year 1930, the Mail Order Company lost money. By 1932 its losses totaled over $1,200,000 (R. 83). Early in 1932 the affairs of the company had reached such a state that a creditors' committee composed of the trade creditors took charge and remained in charge until the summer of 1933. With such funds as it could obtain from collecting accounts receivable and auctioning certain machinery, the committee paid off the trade creditors fifty cents on the dollar (R. 83). From 1932 the Mail Order Company and its subsidiaries carried on no active business, but, on the contrary, were in the process of liquidation (R. 83). Pressed by bank creditors for the repayment of their loans, the company, in April, 1933, deeded its entire plant and equipment at South Bend to one of the banks for the benefit of the others. An oral agreement permitting repurchase within one year

at a figure equal to the amount of the loans involved was never taken advantage of (R. 85).

By the middle of 1933 the Mail Order Company was for all practical purposes entirely shorn of its assets (R. 83–85). In his communication (R. 78–80) to the stockholders dated June 15, 1933, the president of the company, in what he termed "in the nature of a final report," conceded its collapse. Three months later the company's stock was ordered delisted from the Chicago Stock Exchange (R. 89).

A few isolated sales of the company's stock took place during the period 1932 to June 1934, but these sales were at only nominal figures and the exact details thereof are not of record (R. 20, 27–28, 30–31, 49–50, 76, 89). Petitioner sold 1,000 shares on November 20, 1933, for $25, to enable him to establish a loss (R. 89). Prior to the close of 1933, the liquidating value of the petitioner's common stock had been completely wiped out (R. 84, 86, 88). Likewise, the stock had lost its so-called potential value. On June 25, 1934, the Mail Order Company was dissolved (R. 89).

The Commissioner ruled that the petitioner's 2,300 shares of common stock became worthless, in fact, in 1933, and not in 1934, the year the petitioner seeks a deduction for his loss.

Upon appeal to the Board of Tax Appeals the Board sustained the Commissioner's determination. The Circuit Court of Appeals affirmed the Board's decision.

ARGUMENT

This case concerns a loss which the petitioner claims occurred in 1934, but which the Commissioner of Internal Revenue and the Board of Tax Appeals held occurred in an earlier year. The Circuit Court of Appeals held that the Board's decision is supported by the evidence. The petition is based upon the assumption that the evidence which the Circuit Court of Appeals held to be sufficient support for the decision of the Board of Tax Appeals, would have been held insufficient had the taxpayer asserted a claim of loss in a prior year.

There is no support in the record for such assumption. Decisions in other cases involving different factual situations (Pet. 12–13) are obviously inconclusive. What the result would have been had petitioner sought a deduction in 1933 is wholly speculative. It does not appear that any court has denied petitioner a claim for an earlier year based upon the same evidence which has been held to be sufficient to support the determination of the Board of Tax Appeals. It does appear that petitioner sold 1,000 shares of the same stock in 1933 at two and a half cents a share "to enable petitioner to establish a loss" (R. 89).

While petitioner has failed to establish that he would be unable to prove a deductible loss in a year prior to 1934, it is apparent that if he could demonstrate that an additional burden would thus

be imposed upon him, it would be occasioned by the rules that the Commissioner's determination is *prima facie* correct and that the taxpayer has the burden of proof. These rules are well settled and present no question for review.

In any event, no question could arise under the Fifth Amendment. Petitioner claims a deduction, which this Court has repeatedly recognized is a matter of legislative grace. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440. Therefore petitioner has no legal right to a deduction and no standing to complain of the quantum of proof required of one who seeks such a privilege. Cf. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118, 137–138.

CONCLUSION

The petition presents no question which this Court should review; it should therefore be denied.

Respectfully submitted.

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